ORIGINAL

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re	)	
	)	
First Media Corporation	)	
Petition for Declaratory Ruling	)	MM Docket No. 94-123
re	)	
Constitutionality of the	)	
Prime Time Access Rule	)	

To: The Commission

COMMENTS OF FIRST MEDIA TELEVISION, L.P.

FIRST MEDIA TELEVISION, L.P.

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Andrew H. Weissman

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March 7, 1995

Before the

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In re	)	
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Review of the Prime Time	)	MM Docket No. 94-123
Access Rule, Section 73.658(k)	)	
of the Commission's Rules	)	

To: The Commission

COMMENTS OF FIRST MEDIA TELEVISION, L.P.

First Media tELEVISION, L.P. ("First Media"), by its counsel, submits the following comments in response to the Notice of Proposed Rule Making, FCC 94-266, released October 26, 1994 ("NPRM"), concerning the Prime Time Access Rule ("PTAR").

1. In April 1990 First Media's predecessor-in-interest filed a Request for Declaratory Ruling asking the Commission to rule that the Prime Time Access Rule is no longer a constitutionally permissible exercise of the Commission's regulatory power.[1/] That Request remains pending, and its subject matter -- the constitutionality of PTAR -- is one of the issues on which the Commission seeks comment in the NPRM. Id. at ¶58.

2. Because the constitutional issue is fundamental, First Media directs its comments here solely to that issue. While we

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1/ *See* "Request for Declaratory Ruling," filed April 18, 1990, by First Media Corporation.

strongly agree with the many parties who have urged that PTAR, and particularly the off-network portion of the rule, should be repealed simply on policy grounds, we regard the policy issues as no more than incidental to the constitutional question. If the rule is not constitutional, the policy debate is irrelevant. At the same time, we recognize that if PTAR is repealed on policy grounds, First Media's constitutional challenge will be mooted. Even if that is the ultimate outcome, the constitutional issue is too important to be lost in the policy debate as the Commission assesses PTAR. Accordingly, it is the constitutional issue alone that we address here.

3. In response to the Commission's Public Notice of April 12, 1994, First Media submitted Comments and Reply Comments asserting that PTAR can no longer be upheld constitutionally because the concept of spectrum scarcity, which has historically justified broadcast content regulation, is no longer valid. We reassert that position here by appending our previous Comments and Reply Comments as **Appendices A** and **B** hereto, respectively.

4. On one significant point, we wish to supplement our previous comments. Several parties commenting on PTAR in response to the foregoing Public Notice have contended that the Supreme Court reaffirmed the "spectrum scarcity" rationale in its June 1994 decision on the must-carry requirement of the Cable Television Consumer Protection and Competition Act of

1992. Turner Broadcasting System, Inc. v. FCC, 512 U.S. ___, 129 L.Ed. 2d 497 (1994).[2/] That contention is without merit.

5. The Court in Turner was not faced with a challenge to the constitutionality of broadcast regulation or to the continued validity of the scarcity rationale. Rather, it was answering an argument that the cable must-carry rule should be judged by the less rigorous First Amendment standard that has historically applied to broadcasting under the scarcity rationale. The Court held that the scarcity rationale does not apply in the context of cable television because, unlike the broadcast spectrum, cable television does not have inherent physical limitations. 129 L.Ed. 2d at 514-15.

6. Since the scarcity rationale was held inapposite, the Court did not need to decide, and did not decide, whether that rationale remains valid in today's technological world. The Court did observe in the course of its discussion that --

> "Although courts and commentators have criticized the scarcity rationale since its inception [footnote omitted], we have declined to question its continuing validity as support for our broadcast jurisprudence [citation omitted] and see no reason to do so here. The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium." Id. at 515.

[2/] *See, e.g.*, "Reply Comments of the Media Access Project," filed July 14, 1994, p. 20, n. 19; "Reply Comments of Viacom Inc.," filed July 14, 1994, pp. 13-14; "Reply of the Association of Independent Television Stations, Inc.," filed July 14, 1994, p. 3.

From this it is clear that the Court was not purporting to examine or decide the continued merits of the scarcity rationale as constitutional justification for broadcast regulation. It was merely saying that this was not the case to revisit the scarcity rationale because this was not a broadcast case. In no way did the Court suggest that it would decline to revisit the scarcity rationale in a case involving broadcast regulations.

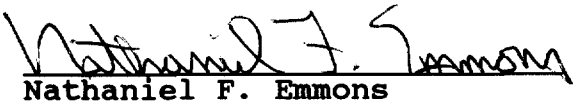
7. The Court has made very clear that it would revisit the scarcity rationale upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of California, 468 U.S. 364, 376, n. 11 (1984). Thus, "spectrum scarcity" is not a fact decreed from on high by the Supreme Court or any other court. It is, as the Supreme Court recognizes, a technological matter within the special expertise of this agency.

8. In the NPRM the Commission cites some of the technological developments that render the concept of spectrum scarcity obsolete. NPRM at ¶18. Other such developments are discussed in the Commission's findings in Syracuse Peace Council, 2 FCC Rcd 5043, 5053-54 (1987), recon. denied, 3 FCC Rcd 2035 (1988), affirmed sub nom., Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). Those findings undermine the scarcity rationale and leave PTAR with no continued constitutional justification.

9. Accordingly, unless PTAR is repealed on policy grounds, the Commission must address the constitutional issue and must rescind the rule as unconstitutional.

Respectfully submitted,

FIRST MEDIA TELEVISION, L.P.

By: 
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March 7, 1995

A

APPENDIX A

Comments of First Media, L.P. Filed June 14, 1994

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re	)	
	)	
First Media Corporation	)	
Petition for Declaratory Ruling re Constitutionality of the Prime Time Access Rule	)	MMB File No. 900418A

To: The Commission

COMMENTS OF FIRST MEDIA, L.P.

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June 14, 1994

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SUMMARY

First Media, L.P., the licensee of WCPX-TV, Orlando, Florida, submits that the Prime Time Access Rule ("PTAR") should no longer be enforced because it can no longer be reconciled with the First Amendment.

PTAR, adopted in 1970, prohibits network affiliate television stations in the top 50 markets from broadcasting certain categories of programs during part of prime time. This restriction upon licensees' freedom to choose what they will broadcast has survived constitutional challenge in the past on the ground that spectrum scarcity has justified government regulation of broadcast program content. In 1987, however, the Commission rejected that rationale when it rescinded the Fairness Doctrine, finding that spectrum scarcity has been eliminated by dramatic technological advances since the 1970's.

In light of that finding, and especially given the near universal availability today of cable television with its vast video channel capacity, there remains no First Amendment justification for restraining the programming discretion of television broadcasters. The spectrum scarcity rationale is no longer valid, and PTAR does not pass the test of strict scrutiny to which it must be subjected under general First Amendment principles.

PTAR is constitutionally infirm because it is a content-based restriction on speech that imposes the programming value judgments of the government in limiting the freedom of broadcasters to choose what they will broadcast. Moreover, PTAR discriminates between classes of speakers. The rule could withstand scrutiny only if it served a compelling governmental interest (which it does not) and if its burdens on speech were merely incidental (which they are not).

Because PTAR is no longer a constitutionally permissible exercise of the Commission's power to regulate broadcasting, the rule should be promptly rescinded.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re	)	
	)	
First Media Corporation	)	
Petition for Declaratory Ruling re	)	MMB File No. 900418A
Constitutionality of the Prime Time Access Rule	)	

To: The Commission

COMMENTS OF FIRST MEDIA, L.P.

First Media, L.P. ("First Media"), by its counsel, submits the following comments relating to the "Petition for Declaratory Ruling" filed April 18, 1990, by First Media Corporation on the constitutionality of the Prime Time Access Rule ("PTAR").[1/] These comments update and supplement the arguments made by First Media in its petition and associated pleadings.

[1/] First Media, L.P. is the current licensee of WCPX-TV and the successor-in-interest to First Media Corporation, which filed the Petition for Declaratory ruling. First Media Corporation is the sole general partner of First Media, L.P. The term "First Media" as used here refers to both entities.

A. Introduction

1. For the reasons stated below, the Prime Time Access Rule is no longer a constitutionally permissible exercise of the Commission's power to regulate broadcasting.

2. PTAR directly prohibits affiliates of ABC, CBS, and NBC in the 50 largest television markets from transmitting certain categories of programs during part of the prime time viewing period.[2/] Specifically, these stations are barred from filling more than three of the four prime time hours with network programs (i.e., programs provided by the network) or off-network programs (i.e., programs formerly on a national network). While exception is made for some favored kinds of network or off-network programs -- namely news, public affairs, documentary, political, children's, certain live sports, and feature film programs -- the rule applies to all other forms of network and off-network programming. As a result, broadcasters subject to the rule suffer a very substantial restriction upon their programming discretion during the heaviest viewing hours of the broadcast day.[3/]

[2/] Prime time is defined as 7:00-11:00 p.m. in the Eastern and Pacific time zones and 6:00-10:00 p.m. in the Central and Mountain time zones. 47 C.F.R. §73.658(k).

[3/] 60.6% of TV households have TV sets in use from 8:00-11:00 p.m. (all nights), as compared to 22.8% during the 10:00 a.m.-1:00 p.m. daypart (M-F) and 28.0% during the 1:00-4:30 p.m. daypart (M-F). Source: Broadcasting Yearbook 1994, p. C-219 (citing National Audience Demographics Report, August 1993).

3. This restraint on broadcasters' freedom to choose what they broadcast has survived constitutional challenge in years past. However, since the last time the issue was addressed, the constitutional framework has been dramatically altered. In its seminal 1987 Syracuse Peace Council decision rescinding the Fairness Doctrine, the Commission rejected as no longer valid the only basis on which broadcast content regulation has ever been reconciled with the First Amendment -- spectrum scarcity.[4/] In so doing, the Commission asserted its view that broadcasters should now have the same First Amendment protections that apply to the print media.

4. The compelling logic of the Syracuse decision leaves the Prime Time Access Rule (like the Fairness Doctrine) without further constitutional justification.

B. The History of PTAR

5. The Commission adopted the Prime Time Access Rule twenty-four years ago to restrain domination of evening television by the three national networks (ABC, CBS, and NBC) and give independent producers access to evening viewing hours. Report and Order, 23 FCC 2d 382, 384 (1970). That action was prompted by the following "relatively simple" facts: (1) there were only

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[4/] Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), affirmed sub nom., Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

three national television networks; (2) in the top 50 markets there were 224 operating television stations, of which 153 were network affiliates; (3) only 14 of the top 50 markets had at least one independent VHF television station; and (4) control over programming and over access to licensed stations was heavily concentrated in the hands of the three networks. Id. at 385-86. The Commission found that those circumstances combined to stifle independent producers and thereby limit the diversity of programming available to the public. Independent producers, said the Commission, "must have an adequate base of television stations to use [their] product," and access to the top 50 markets "is essential to form such a base." Id. at 386. To open adequate outlets for independently-produced programming, the Commission curtailed the amount of prime time that the network affiliate stations could fill with network-produced programming. "Our objective is to provide opportunity -- now lacking in television -- for the competitive development of alternate sources of television programs...." Id. at 397.

6. The Prime Time Access Rule, therefore, was spawned by a dearth of television stations available to transmit non-network programming to the public. And the constitutional justification of the rule was founded on the same premise. When PTAR was challenged as a direct restraint on speech in contravention of the First Amendment, the Second Circuit upheld the rule on the ground that spectrum scarcity justified restrictions

on broadcast content. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971), citing Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969). Articulating the scarcity rationale in Red Lion, the Supreme Court had stated: "Because of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." 395 U.S. at 390. The Court characterized this as "enforced sharing of a scarce resource." Id. at 391.

7. The Commission itself embraced that rationale four years later when opponents of PTAR renewed their constitutional objections before the agency. Acknowledging that PTAR was a "restraint on licensees," the Commission declared that "the inherent limitations in broadcast spectrum space make necessary restraints -- restricting the speech of some so that others may speak -- not elsewhere appropriate." Second Report and Order, 50 FCC 2d 829, 847 (1975). In the nineteen years that have passed since that pronouncement, neither the Commission nor the courts have revisited PTAR.

C. The Scarcity Rationale Is No Longer Valid

8. In 1987, however, the Commission did thoroughly reevaluate and reject the rationale of spectrum scarcity, on which the constitutionality of PTAR was solely premised. Syracuse Peace Council, supra. Noting "the extraordinary

technological advances that have been made in the electronic media since the 1969 Red Lion decision," the Commission urged that the Red Lion premise be reassessed. 2 FCC Rcd at 5048. With respect to video programming services, the Commission found that since Red Lion was decided in 1969: the number of television stations overall in the country had increased by 57%; the number of UHF stations had increased by 113%; the number of television households receiving five or more over-the-air television signals had increased from 59% (in 1964) to 96%; the number of cable television systems had increased (since 1974) by 111%; the number of cable television subscribers had increased (since 1974) by 345%; the percentage of cable systems able to carry more than 12 channels had increased from 1% to 69% (serving 92% of cable subscribers); the percentage of television households with access to cable had risen to 75%; the number of households actually subscribing to cable (43,000,000) had risen by 47%; and significant contributions to programming diversity were now being made by new electronic technologies that had been unavailable at the time of Red Lion, including low power television, MMDS, video cassette recorders (VCRs), and satellite master antenna systems (SMATV). Id. at 5053. The Commission concluded that these "dramatic changes in the electronic media" have rendered obsolete "First Amendment principles that were developed for another market." Id. at 5054. In short, said the Commission, the concept of scarcity is now "irrelevant" in

analyzing the appropriate First Amendment standard to be applied to the electronic media. Id. at 5055.[5/]

9. Today, seven years after the Commission rejected the scarcity rationale in Syracuse, the facts are even more compelling. There is now a plethora of channels available to program producers for the transmission of video programming to the public:

- There are **1,519** licensed full-power and **1,496** licensed low-power television stations in the United States;[6/]

- In the top 50 markets, there are **453** commercial television stations, an average of **9.1** per market;[7/]

[5/] The courts have not yet addressed this. Although the Court of Appeals affirmed Syracuse, it did so without reaching the Commission's constitutional holding. Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). In 1984, three years before Syracuse, the Supreme Court indicated a willingness to revisit the scarcity rationale upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of California, 468 U.S. 364, 376, n. 11 (1984). Additionally, several Eighth Circuit judges have very recently endorsed the idea that changed circumstances now make it appropriate to reevaluate the concept of spectrum scarcity. See Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1442 n.12 (8th Cir. 1993) (suggesting that "the holding in [Red Lion] may well be reconsidered by the Supreme Court now that broadcast frequencies and channels have become much more available").

[6/] Source: FCC News Release, Jume 7, 1994.

[7/] Source: Television & Cable Factbook, Stations Volume No. 62, 1994 Ed., pp. A-1 - A-2 (for top 50 markets specified by FCC Public Notice, Mimeo No. 33069, May 11, 1993).

• Approximately **4,000,000** residential households in the United States have home satellite dishes for direct reception of programming via satellite;[8/]

• **88.3%** of all households, and **89.5%** of TV households, in the United States have access to cable television;[9/]

• **59,332,200** households, constituting **63.2%** of TV households in the United States, subscribe to cable television;[10/]

• **37.9%** of cable subscribers receive 54 channels or more, **55.7%** receive 30-53 channels, and **2.6%** receive 20-29 channels, making a total of **98.2%** who receive 20 channels or more;[11/]

• The basic cable networks now have a higher combined rating, as measured for all TV households (**7.8**) than do NBC affiliates (**4.9**), CBS affiliates (**5.6**), ABC affiliates (**5.4**), or independents (**3.0**);[12/]

8/ Source: Satellite Broadcasting and Communication Association.

9/ Source: Television & Cable Factbook, Cable & Services Volume No. 62, 1994 Ed., pp. I-21 (Arbitron data), I-70.

10/ Source: A.C. Nielsen Co. data, cited in Cable on Line Data Exchange, February 1994.

11/ Source: Cable & Television Factbook, Services Volume No. 62, 1994 Ed., p. I-69.

12/ Source: A.C. Nielsen Co. data, quoted from the Cable Television Advertising Bureau and found in 1994 Cable TV Factbook, pp. 7 & 24.

• A great variety of program services are now received by 20 million or more subscribers, as reflected by the following subscriber data for basic cable networks (predominant format in parentheses):[13/]

Program Service	Total Subscribers
ESPN (sports)	61,059,000
USA Network (movies, sports)	60,000,000
C-SPAN (public affairs)	59,400,000
Discovery Channel (informational)	58,000,000
Family Channel (variety)	57,019,000
Lifetime (informational)	57,000,000
CNN (news, public affairs)	56,797,000
TBS (movies, sports)	55,200,000
MTV (music video)	54,900,000
TNN (entertainment)	54,500,000
Weather Channel (weather)	53,400,000
Nickelodeon (entertainment)	52,900,000
TNT (entertainment, sports)	50,800,000
Arts & Entertainment (movies)	48,000,000
CNBC (business, talk)	47,700,000
American Movie Classics (movies)	45,000,000
Headline News (news)	44,968,000
Video Hits-1 (music video)	44,200,000
QVC (home shopping)	41,000,000

13/ Source: Television & Cable Factbook, Services Volume No. 62, 1994 Ed., pp. G-70 - G-86.

WGN-TV (movies, sports)	38,100,000
BET (Black-oriented entertainment)	34,000,000
C-SPAN II (public affairs)	27,600,000
Mind Extension U (educational)	23,000,000
Comedy Central (comedy)	22,000,000
HSN (home shopping)	21,000,000
Sportschannel America (sports)	20,000,000

10. As these data demonstrate, the enormous growth of cable television alone has turned spectrum scarcity into channel abundance. The great majority of the American public now has access to cable television, which means instant access not to four or five channels (as in the Red Lion era) but to upwards of fifty channels. Likewise, there are now upwards of fifty, not merely four or five, outlets available for producers of video programming who wish to disseminate programs to the public. To the viewer in his living room, there is no functional difference between transmission over-the-air and transmission by wire cable. Both modes of transmission bring video programs to his screen. The Commission is correct, therefore, to aggregate broadcast channels and cable channels when assessing the diversity of program sources available to the public, as it did when it reexamined the notion of spectrum scarcity in Syracuse.

11. Aggregation of functionally indistinguishable broadcast channels and cable channels produces a far different constitutional analysis from that articulated in Red Lion. The

courts have already held that the scarcity rationale cannot sustain regulation of cable television because cable channel capacity is virtually unlimited. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448-51 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986); Home Box Office, Inc. v. FCC, 567 F.2d 9, 44-45 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). If there is no scarcity of channels when only the cable component is considered, there plainly is no scarcity when both the cable and the broadcast components are considered.

12. To be sure, broadcast and cable have heretofore been subjected to different First Amendment standards because broadcast channels are scarce and cable channels are not. However, that distinction is no longer viable if cable channels are deemed equivalent to broadcast channels as sources of video diversity. It is well within the Commission's province and expertise as a regulatory agency to determine that cable channels and broadcast channels are equivalent in that respect, and the Commission so determined in Syracuse. Thus, the Commission has already made the finding that bridges the constitutional gap which once separated broadcasting from cable.[14/]

[14/] The Commission noted in Syracuse that its Fairness Doctrine decision did not call into question the constitutionality of "our content-neutral, structural regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 FCC Rcd 2035, 2041, n. 56 (1988) (emphasis added). However, PTAR is not a structural regulation and (as discussed below) is not content-

(continued...)

13. The technological sea change recognized by the Commission in Syracuse means that the physically limited broadcast spectrum is no longer the only practical means of audio/video communication to a mass audience. A programmer today does not need access to a broadcast station to reach a mass audience. Cable News Network (CNN) is not broadcast. HBO is not broadcast. ESPN is not broadcast. The Weather Channel is not broadcast. The Disney Channel is not broadcast. C-SPAN is not broadcast. USA Network is not broadcast. MTV is not broadcast. As these and countless other national, regional, and local audio/video programmers have now demonstrated, communication to a mass audience is perfectly feasible without the use of any broadcast spectrum. If programmers can bypass the spectrum altogether, the fact that the spectrum is physically limited no longer has relevance for First Amendment purposes.

14. For that reason, President Bush in 1990 urged that content regulation of broadcast programming is no longer justified by the notion of spectrum scarcity. Explaining his unwillingness to sign the "Children's Television Act of 1990" into law, President Bush said:

> I recognize that the Supreme Court has upheld the application of certain content-based regulations to broadcast licensees, on the theory that the "scarcity

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14/ (...continued)
neutral. Thus, the Commission has never suggested that PTAR is exempt from the Syracuse rationale.